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Supreme Court, U.S.
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No. 02-321

In the

Supreme Court of the United States

MACHIPONGO LAND AND COAL CO., INC.;
VICTOR E. ERICKSON TRUST; and
JOSEPH NAUGHTON,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA;
DEPARTMENT OF ENVIRONMENTAL RESOURCES;
THE ENVIRONMENTAL QUALITY BOARD;
ARTHUR A. DAVIS, Secretary of Environmental Resources,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this regulatory takings case, the trial court found a taking of the Petitioners' coal estates in an area in Clearfield County, Pennsylvania. The Pennsylvania Supreme Court reversed and determined that, for purposes of the takings analysis, Pennsylvania property law providing for the unique status of the coal estate was abolished by this Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis*. The Pennsylvania Supreme Court also refused to find that the regulated parcel was the proper denominator in the takings fraction in a manner contrary to *Penn Central Transportation Co. v. City of New York*, *Keystone Bituminous Coal Ass'n v. DeBenedictis* and the trial court's findings. Furthermore, it decided that the Respondents could present the defense of a nuisance even though the record established the state had permitted mining throughout the area both before and after the promulgation of the regulation, and even though Respondents admitted they did not present any evidence at trial that Petitioners would not receive a mining permit. Finally, the Pennsylvania Supreme Court refused to review a clearly erroneous factual determination made by the Commonwealth Court in dismissing one of the takings claims, even though there was no intermediate appellate court.

The questions presented for review are:

1. Is the proper denominator in the takings fraction from a vertical perspective the coal estate where the regulation prohibits all mining of coal in a 555 acre tract and the state's property law recognizes the coal estate as a separate and unique interest in land?

2. Is the proper denominator in the takings fraction from a horizontal perspective the coal estate in the regulated parcel where it has independent economic viability as it can be mined profitably as a separate and independent unit?

3. May a state avoid the payment of just compensation for a regulatory taking resulting from the adoption of a regulation that prohibits the mining of coal, based upon purported background principles of its nuisance law, where the state has permitted others to mine coal in the same area both before and after the adoption of the regulation?

4. Where there was no intermediate appellate court should the lower court have used the standard of review set forth in *Easley v. Cromartie* to evaluate the trial court's factual findings in its dismissal of one of the regulatory takings claims under the Fifth Amendment?

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Eagle, Steven J., *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law"*, 42 N.Y.L. Sch. L. Rev. 345 (1998) 15-16

Eagle, Steven J., *The Regulatory Takings "Notice Rule": Sources and Implications*, *in* 1 ALI-ABA Course of Study—Inverse Condemnation and Related Government Liability 365 (2001) 15

Fee, John E., *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994) 12-13

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 29 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by government regulation of private property.

Attorneys for Pacific Legal Foundation have represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and Pacific Legal Foundation has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 25 years. Because of the Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.

Pursuant to Supreme Court Rule 37, written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Amicus adopts Petitioners' Statement of the Case.

SUMMARY AND INTRODUCTION

This case presents an opportunity for this Court to resolve several issues that have troubled the state and lower federal

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

courts for years—and which this Court has never directly addressed. At issue here is whether the state can prohibit the opening of mines that could remove millions of tons of coal spread across hundreds of acres of land and worth millions of dollars in revenue yet avoid the payment of just compensation—either because the owners have interests in property besides the coal or because the state may adopt a per se nuisance standard wherein existing mines are allowed to operate in the vicinity but newer mines are precluded from opening if there is a "potential" they would "adversely affect the use of the stream as an auxiliary water supply" or harm "habitat for wild trout populations." Opinion of Supreme Court of Pennsylvania, Petitioners' Appendix at 49a.

This brief amicus curiae will focus on two issues raised by the questions presented: First, what is the proper way to measure the denominator of the takings fraction when an owner of a mineable coal deposit is prohibited from mining that deposit yet may have other surface uses of the property or may own other coal outside the prohibited area? And second, to what degree may a state avoid compensation by defining the mining of coal as a nuisance—while at the same time it permits preexisting mining activity to continue in the vicinity?

I

THIS COURT MUST RESOLVE THE QUESTION OF HOW TO DEFINE THE "WHOLE PARCEL" SO THAT LANDOWNERS ARE NOT DENIED JUST COMPENSATION MERELY BECAUSE THEY OWN OTHER INTERESTS IN PROPERTY

A. This Court Has Illustrated the Need to Resolve the Issue of How to Determine the Relevant Parcel in a Takings Analysis

A taking can occur when a regulation deprives an owner of the "economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). In analyzing what has

become known as the "relevant parcel" or the "denominator problem," this Court recognizes that, if a trial court were to examine in a takings analysis ***only*** the discrete segment of property that is affected by a use prohibition, then it is more likely that the court will find a taking. Concomitantly a deprivation of "economically viable use" is less likely to be found if a court were to examine the larger land holdings of a landowner because, so long as the owner can use ***some*** property, the owner has not been deprived of economically viable use of ***all*** of his property.

This Court put the issue this way in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987):

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions in determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Id. at 497 (citation omitted).

In *Keystone*, it is important to note, this Court did not address whether the entire mineral estate was the proper denominator for a takings analysis, but held only that individual and unidentified pillars of coal scattered across numerous mines in the state were not to be considered as the denominator in a facial takings challenge on Pennsylvania's Kohler Act. *Id.* at 498 ("We do not consider Justice Holmes' statement that the Kohler Act made mining of 'certain coal' commercially impracticable as requiring us to focus on the individual pillars of coal that must be left in place."). Contrary to the Pennsylvania Supreme Court's opinion below, *see* Petitioners' Appendix at 30a, this Court did not rule out utilizing the mineral estate as the relevant parcel in appropriate circumstances. As Professor Fee has noted: "It remains an open question after *Keystone* and *Penn Central* whether vertical

interests may be severed when the particular interest is significant enough to be independently viable." Fee, John, *Of Parcels and Property* § 15.3(b) at 109 *in Taking Sides on Takings Issues: Public and Private Perspectives* (Thomas Roberts ed., 2002).

This Court has also on occasion found a taking when only one strand in the bundle of property rights was affected. In both *Hodel v. Irving*, 481 U.S. 704, 718 (1987), and *Babbitt v. Youpee*, 519 U.S. 234, 245 (1997), the Court struck down congressional attempts to force the transfer of small fractional interests to the tribes upon an owner's death.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), this Court found that, when a regulation prohibiting the construction of a single-family home in a residential neighborhood denied "all economically beneficial or productive use of land," it was a "categorical" taking. In this Court's terminology, a "categorical" taking is one where the denial of all economically viable use is a given and where no countervailing concerns—such as the owner's reasonable expectations or the public interest advanced by the use prohibition—can negate the need to pay just compensation for the taking. But this Court expressly left open the question of whether a denial of all use of a part of a parcel might constitute a regulatory taking. 505 U.S. at 1016 n.7.

This Court next looked at the issue when it addressed, but did not decide, the question of whether a takings analysis should focus on just the wetlands owned by Mr. Palazzolo or those wetlands combined with a small amount of upland. This Court noted:

> Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, *e.g.*, *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497, 94 L. Ed. 2d 472,

> 107 S. Ct. 1232 (1987); but we have at times expressed discomfort with the logic of this rule, see *Lucas*, *supra*, at 1016-17 n.7, a sentiment echoed by some commentators, see, *e.g.*, Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 16-17 (1987); Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994).

Palazzolo v. Rhode Island, 533 U.S. at 631.

Ten months later, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002), this Court again addressed the issue, this time reaffirming the concept of the "parcel as a whole," applying it to vitiate the idea that property can be divided into temporal segments. This Court, however, did not decide the question now presented to this Court: how should a court define the whole parcel when regulations affect some, but not all, of the property either in a vertical or horizontal dimension. In *Tahoe-Sierra*, this Court noted that there is much circularity to the suggestion to define "the property interest taken in terms of the very regulation being challenged." 122 S. Ct. at 1483. But that does not resolve the issue. As Professor Fee has written: "Without such a [whole parcel] principle, even the most minimal restrictions would become takings. But the whole parcel rule . . . does not answer the question . . . instead it merely begs the question, what is a whole parcel of property?" Fee, *Of Parcels and Property*, *supra*, § 15.3 at 106.

Defining the parcel by the regulation itself is inadequate; but so too is defining the parcel by other interests in property the owner may happen to own. Such a result would lead to the perverse result that the more one owns the more the government can take through regulation without fear of compensation. As Professor Mandelker has noted, "[i]f a court looks at all of the property held by a landowner, the wealthiest landowners with

large land holdings are often likely to be on the losing side." Mandelker, Daniel R., *New Property Rights Under the Takings Clause*, 81 Marquette L. Rev. 9, 16 (1997). Assuming that the Takings Clause protects landowners large and small alike, there should be no room for such a facile and categorical analysis that agglomerates interests of property together—especially when that property could be measured by other yardsticks, such as the market or, as here, the independent utility of a coal deposit.

B. The State and Lower Courts Do Not Agree on Whether the Denial of All Use of a Portion of a Single Parcel Is a Compensable Taking

There are two aspects of the denominator issue at stake in this case. First, there is the issue of whether the mineral estate can be treated separately from the surface estate for purposes of a takings analysis. Second, because the coal companies here owned coal deposits outside the zone in which mining is prohibited, was it appropriate for the court to suggest that those other coal properties might be considered part of the relevant denominator? In the many cases addressing the denominator issue in a variety of contexts, there is no consistent analysis; the state and lower federal courts are in a state of disarray that only this Court can resolve.

In *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) (*Florida Rock I*), the Federal Circuit Court of Appeals was confronted by a single 1,560-acre parcel subject to the Corps of Engineers' restrictions. The landowner argued that all 1,560 acres of its wetland mining property had been taken after a permit to mine 98 acres was denied. 791 F.2d at 895-96, 904-05. The government argued that there was ***no*** taking because the use of only 98 acres had been denied—leaving the "parcel as a whole" largely unaffected by the denial. *Id.* at 904. The Federal Circuit rejected both arguments, holding that (1) it would be unfair to award compensation for the 1,462 acres for which the applicant had no immediate plans, *id.* at 904-05, and

(2) the court would focus on only the 98 acres to see if there had been a taking. *Id.* at 904.

Several years after *Florida Rock I*, the Federal Circuit responded to the government's new argument that the takings denominator should include more than the mineral rights and surface resources needed for mining. The court disagreed:

> By taking some portion of Florida Rock's economic use of the property—its power to disturb the overlying wetlands, and with it the common law property right to mine its subsurface minerals—the Government appears to have destroyed part of the value of Florida Rock's holdings.

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560, 1572 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) (*Florida Rock IV*). The court said this could be a taking. *Id.* It also noted that in appropriate circumstances a subset of the bundle of rights can be taken through inverse condemnation. *See id.* at 1572 n.32.

Similarly, in a case very similar to *Machipongo*, the Federal Circuit in *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991), rejected the government's suggestion that there was no taking because the coal owner could farm about half of its property. The mineral estate was a significant enough separate interest in property to be considered the denominator.

The Federal Circuit, however, has not been entirely consistent in this respect. In *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999), the Federal Circuit joined together a regulated wetland portion of the owner's development with an unregulated upland parcel for purposes of a takings analysis.

The Tenth Circuit in *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995), expressly rejected the *Florida*

Rock IV holding. *Clajon* involved an attempt to bring a takings challenge to hunting regulations in Wyoming that limited wild game licenses sold to hunters from out-of-state. The plaintiff, who derived income from out-of-state hunters, complained that this was a taking of a property right in hunting. 70 F.3d at 1577. In ruling against the rancher, the Tenth Circuit expressly rejected the Federal Circuit's language in *Florida Rock IV* that it can be appropriate to focus on the property interest actually taken:

> However, we believe that the relevant denominator must be derived from the entire bundle of rights associated with the parcel of land. . . . Thus, we reject the *Florida Rock* approach.

Id. (citations omitted).

More recently, in *Boise Cascade Corporation v. Board of Forestry*, 935 P.2d 411 (Or. 1997), a landowner was prohibited from logging 56 acres on a 64-acre tract because of a spotted owl nest. The Oregon Supreme Court held that the landowner could state a claim for a regulatory taking. *Id.* at 415-16. Thus the court segregated the 56 acres of owl habitat from the remaining 8 acres of harvestable timber and considered the timber on the 56 acres to be the relevant parcel.

The lesson from these cases is that some courts have been quite willing to focus on the property subject to the regulation rather than the "whole" parcel owned by the landowner while other courts have been unwilling to do so. This is a conflict that only this Court can resolve.

C. Some Courts Have Focused on the Interests in Property Subject to a Particular Regulation for the Purpose of a Takings Analysis

In *American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981), the county placed two contiguous sections of an owner's property into two distinct

zoning classifications. First, there was a 48-acre section called Strawberry Spit zoned as "urban open space" with a 5-acre minimum lot size. Another 20-acre section known as "Strawberry Point" was zoned to allow four "multiple residential units" per acre. *Id.* at 367. The owner alleged a taking of Strawberry Spit. In response, the county advocated a "single parcel" theory under which both the point and the spit would be considered together in a takings analysis.

The court rejected as inapplicable cases where property was treated as a single unit for takings purposes because in those cases "the entire subject property was covered by a uniform restriction." *Id.* at 369. Instead, the court noted that in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), this Court "considered the smaller tract separately from the larger tract." *American Savings*, 653 F.2d at 370.

The Ninth Circuit also agreed with dicta in *Fifth Avenue Corp. v. Washington County*, 581 P.2d 50, 60 (Or. 1978), where "the [Oregon Supreme] court divided the property analytically into two separate parcels" depending on whether they were zoned as developable or not. *American Savings*, 653 F.2d at 370.

Most significantly, the *American Savings* court concluded by holding that if the appellant can show that

> the Spit and Point have been, or would be, treated separately when its development plans are submitted . . . [then] the Spit must be analyzed as a separate parcel for takings purposes.

Id. at 372.[2]

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[2] *Accord Kaiser Development Co. v. City and County of Honolulu*, 649 F. Supp. 926, 947-48 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990) ("Most importantly, the City has treated Queen's Beach separately for zoning and planning purposes. . . . [U]nder the facts

(continued...)

In *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), the New York Court of Appeals addressed a challenge to New York City's law regulating the conversion of single-room occupancy housing. The city had suggested that the property owners could have no claim to a taking or denial of economically viable use after comparing the value of the rights affected by the law with the total "bundle" of the owners' property interests. 542 N.E.2d at 1067. The court did not agree finding that "the permanent abrogation of one of those rights, without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking." *Id. Accord Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (finding the destruction of a reversionary interest to be a regulatory taking).

The court below is in conflict with the opinions of the Ninth Circuit and New York; to achieve consistency this Court should grant the petition for writ of certiorari.

D. The Court Below Is One of Several That Is in Conflict with the Logic of This Court Expressed in *Lucas* That Proscribes the Joining Together of Parcels for a Takings Analysis

In *Lucas*, this Court expressly rejected as "extreme" and "unsupportable" the notion advocated by the New York Court of Appeal in *Penn Central Transportation Company v. City of New York*, 366 N.E.2d 1271, 1276-77 (N.Y. 1977),

> where the state court examined the diminution in a particular parcel's value . . . in light of total value of the takings claimant's other holdings in the vicinity.

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[2] (...continued)
of this case, Queen's Beach is to be considered a separate parcel for the purposes of determining whether there has been a taking. (Footnote omitted.)).

Lucas, 505 U.S. at 1016 n.7. There is a logical incongruity in the notion that owners of lots of property should be treated worse than owners of only a small amount of property. Nevertheless, some courts have found that the ownership of other interests in property potentially diminishes the impact on a regulated interest in property.

The Michigan Supreme Court in *K & K Construction, Inc. v. Department of Natural Resources*, 575 N.W.2d 531 (Mich.), *cert. denied*, 525 U.S. 819 (1998), combined a 55-acre parcel with two other parcels of 16 and 3.4 acres for purposes of determining whether there was a taking. The court reasoned that the parcels were owned in whole or in part by the same owner of the 55-acre parcel and that there was a unified plan of development. The same reasoning was followed in *Volkema v. Department of Natural Resources*, 542 N.W.2d 282 (Mich. Ct. App. 1995), *cert. denied*, 525 U.S. 1040 (1998).

The Michigan example was also followed in *Karam v. New Jersey Department of Environmental Protection*, 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998), *aff'd by adopting appellate opinion*, 723 A.2d 943 (N.J.), *cert. denied*, 528 U.S. 814 (1999). In *Karam*, the appellate court examined the history of a lot comprised of an upland and wetland unit and found the two portions to be a single unit for a takings analysis.

These cases all follow the logic of the notion that this court rejected in *Lucas*: The more real property one owns, the more the government can take without having to pay for it. Professor Eagle has criticized this approach, calling it "conceptual agglomeration" in apposition to the idea of "conceptual severance" that this Court rejected in *Tahoe-Sierra*. Eagle, Steven J., *Regulatory Takings* § 11-7(b)(2) (2d ed. 2001). *See also* Fee, *Of Parcels and Property*, *supra*, § 5.1 at 103 (discussing principle of conceptual agglomeration).

E. Toward a Coherent Determination of the Relevant Parcel

The deficiencies in a model that looks to defining a parcel only by the extent of governmental regulation has been well expressed by this Court and by the commentators. *See, e.g.*, *Tahoe-Sierra*, 122 S. Ct. at 1481; Fee, *Of Parcels and Property*, *supra*, § 5.6 at 115-16. Likewise, the deficiencies in a model that focuses on unity of ownership has been well expressed by this Court and the commentators. *See, e.g.*, *Lucas*, 505 U.S. at 1016 n.7; *Palazzolo*, 533 U.S. at 631; Fee, *Of Parcels and Property*, *supra*, § 5.4 at 112-13. Overall, at present, the denominator issue remains a "muddle" that has evaded "the hard, pragmatic, ethical question: when is it fair to ask owners of land to bear costs that society as a whole must accept?" Mandelker, Daniel, *New Property Rights*, *supra*, at 19.

A better way to analyze the takings denominator is to conclude that

> any identifiable segment of land is a parcel for purposes of regulatory taking analysis if prior to regulation it could have been put to at least one economically viable use, independent of the surrounding land segments.

Fee, John E., *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535, 1557 (1994).

The key language here is "independent of the surrounding land segments." With this qualifier, the specter of governments being forced to pay for reasonable setbacks and similar regulatory restrictions is eliminated. Under this standard,

> it must be shown that there existed prior to regulation at least one economically viable use for the land, the value of which is derived independently of the immediately surrounding land interests.

Id. at 1558. As Fee explains:

> In many situations, an identifiable segment of land may be put to no economically viable use, other than to expand or beautify a building or business operation existing on a neighboring segment of land.

Id. at 1559. A restriction on the use of such a segment of land, such as with a typical setback, would not be typically compensable under this "independent of the surrounding land segments" qualifier. The only exception would be if this segment were significant enough that by itself it could be economically useful for a purpose unrelated to the use of the neighboring segment. Fee concludes:

> Under no circumstances should an owner of a city lot be compensated for what is in fact a diminution in value of the entire lot by alleging that the buffer zone has been completely taken.

Id. at 1559-60.

Another articulation of a workable solution to the problem is suggested by Professor Eagle, who writes, hopefully,

> that the Court will take a commonsense approach to the takings denominator, perhaps through extending a presumption of validity to estates commonly employed in the vicinity in similar projects where specific regulatory concerns were not at issue. Correspondingly, the state could not merge for takings purposes lots or interests which customarily would be treated as a separate for real property purposes.

Eagle, *Regulatory Takings*, *supra*, § 11-7(b)(3) at 793. Alternatively, Professor Mandelker suggests an "expectations" approach. *See* Mandelker, *New Property Rights*, *supra*, at 17-18. These commentators have explained that this Court has not yet fully explicated the "whole parcel" rule. As a result, the state and lower federal courts are in disarray. There are

balanced and nuanced solutions to the dilemma; this Court should grant the petition for writ of certiorari to resolve, perhaps once and for all, the question of the denominator.

II

BACKGROUND PRINCIPLES OF PROPERTY LAW MUST NOT BE REWRITTEN BY SPECULATIVE POTENTIALS OF NUISANCE

A. Background Principles of Nuisance Law Are Not Created by Recent Legislative Enactments

While Amicus understands the importance of ensuring that uses of property do not cause genuine harm, it is difficult to accept the notion that background principles can be different for adjoining properties, depending solely on whether one developed a mine before or after the adoption of a set of mining regulations. As this Court said in *Palazzolo*, "[a] regulation or common-law rule cannot be a background principle for some owners but not for others." 533 U.S. at 630. Yet that is exactly what happened below. Many mines continue to operate in the vicinity of Petitioners' properties, some even within the same watershed. There is no intrinsic distinction between the mines currently operating and those that have not yet been opened. *See* Petition for a Writ of Certiorari at 25. Yet this fact is completely ignored in the Pennsylvania Supreme Court's analysis of whether the "nuisance exception" should be applied to Petitioners' properties. Amicus urges this Court to grant the petition for writ of certiorari in order to make plain that the invocation of the law of nuisance as a background principle must be consistent—if existing uses are permitted to continue then identical uses with identical effects must be permitted or a takings analysis must be performed without being limited by inconsistently applied "background principles."

This Court in *Lucas* clearly indicated that the relevant "background principles" must be grounded in the State's common law. To avoid the constitutional mandate of just

compensation, a prohibitory regulation must "do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." *See Lucas*, 505 U.S. at 1029.

The point of relying on the common law as a reference point has been elucidated by Professor Eagle:

> The gravamen of Justice Scalia's exposition is that there is a "historical compact," which is part of our "constitutional culture," which prevents a "newly legislated or decreed" deprivation of all economically beneficial use. The requirement that the regulation be rooted in "background principles of the State's law of property and nuisance" invokes the State's common law, thereby precluding opportunistic regulation while not freezing legal doctrine at an arbitrary point in time . . . creating a "sea anchor" that would steady a ship against abrupt movement in storms but which would allow it to move over time with more gentle and steady currents.

Eagle, Steven J., *The Regulatory Takings "Notice Rule": Sources and Implications*, *in* 1 ALI-ABA Course of Study—Inverse Condemnation and Related Government Liability 365, 370-71 (2001).

> "Statutory law is changeable only by legislatures who seemingly sail with the winds of popular opinion." Like the sea anchor, background principles do not prevent gradual change, but do keep individual rights from being capsized by squalls of legislative passion.

Eagle, Steven J., *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law"*, 42 N.Y.L. Sch. L. Rev. 345, 399 n.337 (1998) (citation omitted).

In *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994), the United States Court of Appeals for the Federal Circuit understood that background principles under *Lucas* are limited to the common law definitions of nuisance:

> The [Lucas] Court explained that the basis for the state's reservation lies in the principles of *common law nuisance*. Property rights as a matter of law since Blackstone's day have been understood to be subject to the power of the state to abate nuisances. If the imposed restraint would have been justified under the state's *traditional nuisance law*, then the property owner's bundle of rights did not include the right claimed, and no taking could occur.

(Emphasis added.)

Finally, the South Carolina Supreme Court recognized it was bound by the Lucas decision to consult the State's common law to find a rationale supporting the uncompensated denial of all beneficial use of Mr. Lucas's property. The South Carolina Supreme Court concluded on remand:

> We have reviewed the record and heard arguments from the parties regarding whether [the state] possesses the ability under the *common law* to prohibit Lucas from constructing a habitable structure on his land. [The state] has not persuaded us that any common law basis exists by which it could restrain Lucas's desired use of his land; nor has our research uncovered any such *common law* principle.

Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992) (emphasis added).

This Court in *Lucas* also pointedly noted that if a particular use is to be categorized as a nuisance in one area, then it would be inconsistent to allow identical uses to continue in the same area:

> The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, see *id.*, § 827, Comment *g*. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

505 U.S. at 1031 (citing Restatement (Second) of Torts).

If any doubt remained, this Court confirmed in *Palazzolo* that background principles are limited to the state's common law of property and nuisance. In *Palazzolo*, this Court reaffirmed *Lucas* by holding that the state may escape payment for a categorical taking only if the prohibition inheres in the title of the property. *See Palazzolo*, 533 U.S. at 629-30. Further, this Court held that the proscribed uses that inhere in the property's title are determined by background principles that can be found in the State's common law of property and nuisance. *Id.* This Court wrote that the "relative standard . . . is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition, see *Lucas*, *supra*, at 1029-1030." *Id.* at 630.

In the case at bar, the court below strayed from this Court's precedent of *Lucas* and *Palazzolo* by finding that the unsuitable for mining designation might allow the state to evade compensation should it find the potential of adverse impacts on water quality—despite the fact many other mines continue to operate in the region and even in the same watershed. *See* Petition for a Writ of Certiorari at 25.

B. The State Has the Burden of Proving That a Court Would Grant Relief for a Nuisance Against the Prohibited Use if the Regulation Were Not in Place

This Court in *Lucas* defined the level of proof that the state must meet to escape paying just compensation for a regulatory deprivation of all beneficial use. In that case, the South Carolina Supreme Court was instructed that it could not merely proffer a declaration "that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim." *See Lucas*, 505 U.S. at 1031. Instead, the Court required that the state meet the same burden as "if it sought to restrain Lucas in a common-law action for public nuisance." *Id.* In other words, the state has a burden of proof that is equal to that required to be granted equitable relief against a nuisance.

The Florida Supreme Court has recently confirmed this analysis by ruling that uncompensated regulatory prohibitions must "mirror" the relief which would have been available in a nuisance abatement action under the common law. *See Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 876 (Fla. 2001).

In *Keshbro*, the Florida Supreme Court reviewed whether two cities that ordered the closure of rental properties owed just compensation to the landowners. The court evaluated the cities' orders in each case to determine if the prohibited uses could have been enjoined under a nuisance action. If so, the city would not owe compensation. The court determined that the first landowner (in Miami) was not entitled to compensation because the use of the property was "inextricably intertwined with the drug and prostitution activity sought to be enjoined." *See id.* As to the abatement order in Jacksonville, the court determined that the landowner was entitled to compensation because the proscribed activity did not rise to a level that would have been enjoinable under the common law. *See id.* at 876-77. By its contrasting treatment of these otherwise similar

prohibitions, the Florida court has clearly illustrated that for the government to be excused from paying just compensation for a taking, the asserted background principles must prohibit a use that qualifies for an injunction as a nuisance. *See id.*

In the case at bar, the Pennsylvania court does not suggest for a minute that dozens of mines in the vicinity of Petitioners' property can be shut down immediately because they constitute a nuisance. Nuisance law, of course, balances competing interests and does not hold one public interest above all others. Yet, by creating a per se rule that any potential showing of adverse impacts on the water supply can justify the uncompensated prohibition against mine openings—but not apparently the closure of existing mines, the Pennsylvania court has misapplied the standard given in *Lucas*.

This is to be contrasted to a nearly identical Takings Clause lawsuit pending before the Ohio Supreme Court where the appellate court found that proposed coal mining would not constitute an impending, serious harm to the public water supply because it lacks the required "actual, real, material, substantial, serious and permanent or potentially permanent injury or an appreciable interference with the ordinary enjoyment of land." *See Ohio ex rel. R.T.G., Inc. v. Ohio*, 753 N.E.2d 869, 883 (Ohio Ct. App. 2001). In other words, R.T.G.'s mining did not reach that level of harm that would support a finding of nuisance.

The state can prevent mining in an area declared unsuitable for mining in order to protect the public health and safety. But courts must not conflate the "background principles" language of *Lucas* with the full extent of the state's police power—under which an activity that has been lawful for centuries and is still lawful in most areas today, may suddenly be proscribed. Likewise, in *Lucas*, this Court found that a state could invoke the rubric of background principles only when: "The use of these properties for what are now expressly

prohibited purposes was *always* unlawful . . . ." *Lucas*, 505 U.S. at 1030.

In short, if coal mining has always been a lawful activity, it cannot suddenly be decreed outside the realm of cognizable property interests. While the State can certainly exercise its police power to prohibit mining, it cannot do so in a way that destroys the economic viability of the affected property and escape liability under the Takings Clause by invoking the mantra of "background principles" or "nuisance."

The conflict created by the Pennsylvania Supreme Court threatens to sow confusion by redefining the law of nuisance so that two identical uses are categorized differently. Existing older mines are not nuisances while mines not yet permitted would be nuisances. This Court should grant the petition for writ of certiorari in order to address such an arbitrary evasion of the Takings Clause.

CONCLUSION

For the reasons stated, this Court should grant the Petition for a Writ of Certiorari.

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Respectfully submitted,

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